AZIZAH SHAIK ISMAIL & ANOR *a*

v.

FATIMAH SHAIK ISMAIL & ANOR

HIGH COURT MALAYA, PULAU PINANG *b*
SU GEOK YIAM JC
[CRIMINAL APPLICATION NO: 44-75-2001]
5 AUGUST 2002

CONSTITUTIONAL LAW: *Jurisdiction - High Court - Custody of Muslim child - Custody order by Syariah Court - Breach - Application to commit respondents to prison refused by Syariah Court - Enforcement of custody order - Whether could be made by way of habeas corpus - Whether within exclusive jurisdiction of Syariah Court to adjudicate - Whether could only resort to appeal procedure in Enactment - Federal Constitution, arts. 5(2), 74, 75, 121(1A) - Administration of Islamic Religious Affairs Enactment 1993 (Penang), ss. 48(2), 50(1), 81, 86(1), 87* *c* *d*

CRIMINAL PROCEDURE: *Habeas corpus - Custody of Muslim child - Writ of habeas corpus for production of child in court for determination of order in her interest - Child not illegally or improperly detained - Whether writ tainted with improper grounds - Whether outside scope of habeas corpus application - Criminal Procedure Code, s. 365(a)* *e*

The applicants had obtained a custody order from the Syariah Court for the custody of their 14-year old daughter ('the child') who opted to stay with the respondents. Notwithstanding the custody order, the child continued to live with *f* the respondents, and that being so the applicants applied to commit the respondents to prison for an alleged breach of the custody order. The Syariah Court, however, refused to commit the respondents ruling that the respondents had shown reasonable cause, as the child herself had refused to return to the applicants. Dissatisfied, the applicants filed a writ of *habeas corpus* in the High *g* Court, applying for the production of the child for the hearing thereof and for an order that the child be returned to them on account of the custody order and if the court felt that such an order was in the best interest of the child. Before the learned Judicial Commissioner, the respondents raised a preliminary objection that the application, being one for the custody of a Muslim child, *h* was within the exclusive jurisdiction of the Syariah Court, and that the civil court, by reason *inter alia* of art. 121(1A) of the Federal Constitution, was barred from hearing or entertaining the same.

i

Held:

[1] By virtue of ss. 81 and 87 of the Administration of Islamic Religious Affairs Enactment (Penang) 1993 ('the Enactment'), custody of a Muslim child is a subject matter that comes within the jurisdiction of the Syariah Court. The fact that the remedy sought by the applicants is a writ of *habeas corpus*, the jurisdiction over which has not been expressly conferred on the Syariah Court by the Enactment, does not mean that the High Court is seized with jurisdiction to try the matter. (p 82 c-d)

[2] The order of the Syariah Subordinate Court dismissing the applicants' application to commit the respondents to prison for non-compliance of the custody order is a valid and subsisting order. That order has overtaken the custody order and by virtue of art. 121(1A) of the Constitution cannot be challenged in a civil court. The High Court having no jurisdiction to review the order, the only recourse left for the applicants is to appeal against the order to the Syariah High Court. (p 84 b-c)

[3] The application here is for the child to be produced so as to enable the court to determine whether it is for her good that she be returned to her natural parents. That being so the court has no jurisdiction to grant the order sought for, as a writ of *habeas corpus* to set the child at liberty could only be granted upon the court's satisfaction that the child has been illegally or improperly detained. Clearly, it is for the Syariah Court to decide whether it is for the good of the child that she returns to the applicants. (p 84 f-g)

[3a] The child was aged 14 years at the time of the filing of the application and 14 years six months when the court heard the application. In the circumstances, it is also for the Syariah Court to determine whether she has already reached an age when she has a will and wishes of her own and is able to express an independent opinion. (p 85 a-b)

[Application dismissed.]

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(foll)***

Lim Yik Ying v. Liang Yung Piao & Anor [1999] 4 CLJ 589 CA ***(dist)***

Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Ors [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(refd)***

Mohamad Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***

NMY (an infant) v. Pengetua, Pusat Pemulihan Gadis, Taman Sri Puteri, Rembau, Negeri Sembilan [1995] 3 CLJ 386 HC ***(refd)***
Nor Kursiah Baharuddin v. Shahril Lamin & Anor [1997] 1 CLJ Supp 599 HC ***(dist)***
Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia Kedah & Anor [1999] 2 CLJ 5 FC ***(foll)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 FC ***(foll)***

Legislation referred to:
Administration of Islamic Religious Affairs Enactment 1993 (Penang), ss. 48(2)(b)(iii), 50(1), 81, 87
Criminal Procedure Code, ss. 365(a)(ii), 366
Federal Constitution, arts. 5(2), 74, 75, 121(1A)
Islamic Family Law (State of Penang) Enanctment 1985, ss. 81, 82, 83, 84, 85, 86(i), 87
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:
Mallal's Digest of Malaysian and Singapore Case Law, 4th edn, 2001 reissue, vol 5

For the applicants - Darshan Singh Khaira; M/s Darshan Singh & Co
For the respondents - Ahmad Munawir; M/s Lim Kean Siew & Co

Reported by WA Sharif

JUDGMENT

Su Geok Yiam JC:
This is a criminal application *vide* an originating motion filed on 13 December 2001 (encl. 2) together with a supporting affidavit (encl. 1) and a certificate of urgency (encl. 3) for a writ of *habeas corpus* pursuant to art. 5 of the Federal Constitution (hereinafter referred to as "the FC") and s. 365 of the Criminal Procedure Code (hereinafter referred to as "the CPC") for a child, Nazirah binti Kamaldin (hereinafter referred to as "the child"), to be brought forthwith before the court by the respondents and to receive whatever order that may be made by the court for the good of the child, that the respondents pay the costs of the application, and that the child be brought before the court for the hearing of the application.

The grounds as set out in the application are that the child is under aged and is the natural child of the applicants and there is an order dated 4 May 2001 that the custody of the child be given to the applicants. The other grounds are as set out in the applicants' joint affidavit in support of their application.

The following facts (both agreed and disputed) and background are contained in the applicants' supporting affidavit (encl. 1) jointly affirmed on 12 December 2001, the respondents' affidavit-in-reply (encl. 5) affirmed on 10 January 2002 and the applicants' affidavit-in-reply (encl. 6) affirmed on 22 January 2002.

The Applicants' Case

The applicants, Azizah binti Shaik Ismail and Kamaldin bin Mohd Abdullah, are the natural parents of the child. At the time when the application was filed, the child, the youngest of the applicants' four children, was aged 14 years. The applicants have three other daughters aged 21 years, 20 years and 16 years, respectively.

The 1st respondent, Fatimah binti Shaik Ismail, a housewife, is the youngest sister of the 1st applicant. She is married to Osman bin Abdul Hamid, the 2nd respondent, who operates a small provision shop in Kedah. The 1st and 2nd respondents are the *de facto* foster parents of the child. This came about because when the 1st applicant gave birth to the child by caesarean section on 22 December 1987 the 1st applicant was in ill-health.

The 1st respondent was asked to look after the child temporarily. However, three months after delivering the child, the 1st applicant suffered from post-partum depression and was treated at the Psychiatric Unit of the Penang General Hospital for about one and a half months after which she recovered completely.

The child, however, continued to be taken care of by the 1st respondent. The 1st respondent would bring the child to the applicants' house in Penang and leave the child there during the weekends, public holidays and even during the week days during the child's pre-school days. The 1st respondent, too, would go to the applicant's house and stay there when she wanted to be near the child. During the child's primary school days the child visited the applicants during the weekends and stayed with the applicants during the school holidays, Hari Raya holidays and other religious holidays.

Subsequently, the applicants noticed that the child was not studious. She did not pay attention to her studies nor her books. She did not have any reading habits unlike their three other children. She whiled her time away in frivolous activities like listening to the radio, watching Hindi and Malay movies on television and video compact discs or just chitchatting over frivolous things. The respondents, too, did not bother to encourage the child to study. Neither did they supervise nor guide the child in her studies. The respondents wanted the child to assist them in the running of their small provision shop and mini market and at the night market or "pasar malam" together with their neighbour and to receive payment from their neighbour. The child was not taught proper

manners, deference to and respect for elders in accordance with Malay customs. The applicants taught her the proper way to behave and scolded the child on several occasions, and on one or two occasions the 1st applicant hit the child.

When the child was due for her secondary education, the applicants enrolled her in a school in Penang. However, the respondents kept on harassing the child and even took her back to Kedah and changed her school without the applicants' knowledge or consent. The respondents also took the child home every Saturday when the applicants were at work without the applicants' knowledge or consent. This interrupted the child's studies. Sometimes, the respondents asked the child to return home by bus.

The applicants intend to send the child to university like all their other daughters and are afraid that if the child is allowed to remain with the respondents, there is no hope of that. About a year before filing this application, the 1st applicant began to criticise the 1st respondent about the upbringing of the child by the respondents, their lack of proper guidance, control and supervision over the child and the lack of progress by the child in her studies. She was weak in almost all her school subjects.

This caused the respondents to take offence and umbrage and they, suddenly, refused to allow the applicants to see the child or allow the child to see the applicants and instead began to instigate the child against the applicants and to poison the child's mind against the applicants. When the 1st applicant telephoned the child, the child abused the 1st applicant. All the applicants' relatives and friends tried to intervene to persuade the respondents to settle the matter amicably but to no avail as the respondents refused to compromise nor to allow the child to be returned to the applicants. Despite all these the applicants have no intention to sever ties with the respondents.

The applicants felt that they had no choice but to engage M/s Razak & Co, Penang as their solicitors to file a summons in the Mahkamah Rendah Syariah Bandaraya Georgetown *vide* case No: KM 01-305-2000 in September 2000 seeking for custody of the child and stating the willingness of the applicants to allow the child to visit the respondents and even to stay with the respondents during the weekends although in law the respondents have absolutely no rights over the child because there has not been a formal adoption of the child by the respondents. The respondents did not object to the summons. They also did not file any defence to the summons and on 5 October 2000 an order was made by the Syariah Court giving the applicants custody of the child until she is aged 16 years (exh. "A1") (hereinafter referred to as "the custody order"). Thereafter, the child returned to the applicants but the respondents continued to disturb the child's peace of mind and finally succeeded in persuading her

to return to them. The applicants exercised a tight control over the child, especially in her studies and the child did not like it. After taking the child, the respondents refused to return the child and the applicants through their solicitors filed against the respondents a civil case in the Georgetown Syariah Court *vide* No: KM 01-383-2000 for breaching the custody order. Unfortunately, on 4 May 2001 the Georgetown Syariah Court dismissed the applicants' application.

Out of good relationship and kindness, the applicants did not want to force the respondents to give custody of the child to the applicants but the future of the child is at stake. The applicants love the child. All attempts by the applicants' relatives have failed to persuade the respondents to give custody of the child to the applicants. The respondents remain adamant, defiant and stubborn. When the respondents knew that the applicants intended to file legal proceedings to obtain a court order they even instigated the child to make police reports against the applicants. The respondents also told the child that the child could not be returned to the applicants as the respondents had won the case in the Syariah Court and that the police would arrest the child if the respondents returned the child to the applicants. The child has frequently been absent from school which the applicants suspect is due to the respondents wanting the child to help the respondents in their shop during the day and at their van during the night time at the night market. The applicants are also unhappy that the respondents' foster son, Mohamed, who is eight years old and who is not related by blood to the applicants nor to the respondents, is staying in the same house as the child.

The respondents are bound by the custody order and to obey the same but the respondents have continued to defy the same and also to deny the applicants access to their own natural daughter. The applicants sought to commit the respondents for breaching the custody order. Unfortunately, while the Mahkamah Rendah Syariah held on 4 May 2001 that the respondents were in breach of the custody order it also held that the respondents had shown reasonable cause as to why the respondents should not be committed to prison since the child herself has refused to return to the applicants. The applicants were advised to take other proceedings in the civil courts.

The Respondents' Case

In their affidavit-in-reply, the respondents expressly reserved their right to raise a preliminary objection on the ground that this court has no jurisdiction to entertain the applicant's application for a writ of *habeas corpus.*

The respondents aver, *inter alia*, that when the child was only two weeks old she had been handed over to them with the consent of the applicants to be brought up as the child of the respondents on the ground that the applicants already had three daughters whereas the respondents did not have any child of their own.

The respondents deny that the child was only handed over to them to be cared for temporarily. The respondents state that right until the time when the child attained the age of ten years, the applicants did not express any intention to have the child returned to them.

The respondents aver that up until the date they affirmed their affidavit-in-reply the 1st applicant has not recovered fully from her psychiatric condition because the conduct of the 1st applicant is not normal as the 1st applicant often abuses her family members including her mother and the child. It was because of this reason that the child has refused to return to the 1st applicant despite being persuaded to do so.

The respondents aver that they have never prevented the child from becoming close to the applicants who are, after all, the child's natural parents. The respondents deny that they have not brought up the child properly. The respondents also deny that the child took any part in their daily business affairs as they have engaged full time workers to assist them.

The respondents describe the child as a wholesome teenager who is disciplined both in her studies as well as socially and who spends most of her free time in school activities and in pursuing knowledge.

Out of love and affection and because of family ties, the respondents handed the child back to the applicants. The child was registered in a secondary school in Penang. The applicants promised the child that she would be allowed to visit the respondents once every fortnight during term time and also during the school holidays. However, the child was only allowed to visit the respondents in the first month. In the second month, the 1st applicant disallowed the child from visiting the respondents. The 1st applicant also disallowed the respondents from visiting the child at the applicants' home. The 1st applicant further took to abusing the respondents in front of the child.

This caused tension between the child and the applicants which led to the child running away from the applicant's home on several occasions. Nevertheless, the respondents persuaded the child to return to the applicants' home by sending her back to the applicants' home.

The 2nd applicant gave his word to the respondents that he would persuade the 1st applicant not to repeat her previous conduct of scolding the child and disallowing the child from visiting the respondents.

In August 2000, the 1st applicant hit the child with a metal clothes hanger until the child's head became swollen. The 1st respondent lodged a police report *vide* Dato' Keramat, Timur Laut, Pulau Pinang Report 3372/2000 (exh. "C") and took the child to the hospital to seek treatment. This led to the child refusing to return to the applicants, especially the 1st applicant.

The respondents aver that the custody order was made by consent on their first appearance in the Syariah Court without the knowledge or consent of the child because they wanted to avoid any undesirable incident from befalling on the child. At that time they were given to understand that they had no defence on merits in respect of the applicants' claim for custody of the child. They also had no benefit of legal advice concerning their and the child's legal rights.

Subsequent to the custody order, the child had on 14 October 2000 lodged a police report *vide* Tikam Batu Report No: 864/2000 (exh. "D") expressing her desire to stay with the respondents.

The applicants, however, insisted on taking the child against her will. On 26 October 2000, the child lodged another police report *vide* Tikam Batu Report No. 910/2000 (exh. "E") alleging that when she refused to follow the applicants at the Tikam Batu Police Station a struggle ensued when her natural father attempted to force her into a taxi and the applicants used force on her by dragging her and punching her on her back. In the process her dress was torn and she felt ashamed. She also had scratches on her back.

The Social Welfare Department acted upon the child's complaint and prepared a report dated 29 October 2000 (exh. "F") in which it was stated, *inter alia*, that the child has refused to return to her natural parents after having being beaten in the month of August. It also stated that the child could not adapt to conditions in her natural parents' home and, therefore, she was not able to continue to live with her natural parents.

The respondents also stated that the applicants made three attempts to take the child but failed to do so because of the child's refusal to follow the applicants and on the 3rd attempt, ie, on 26 October 2000, the child's dress was torn and she was prepared to sleep in the surau rather then return with her natural parents to Penang.

The respondents have sought advice from their syarie solicitors and have been advised *inter alia*, that the acts of the applicants, in particular, the 1st applicant, threatened the welfare and safety of the child and can cause them to be deprived of their right to the custody of the child and that the respondents can apply to have the custody order set aside.

On 21 November 2000 the applicants successfully applied for an order from the Georgetown Mahkamah Rendah Syariah that the respondents do show cause why they should not be committed to prison for breaching the custody order.

In the course of the committal proceedings the learned Syariah judge interviewed the child in his chambers and based on the affidavits of both parties and having heard both their counsels' submissions held, on 4 May 2001, that the respondents had shown reasonable cause why they should not be committed to prison and dismissed the applicants' application.

His grounds for doing so appear in his judgement (exh. "H").

Following from that the respondents have instructed their syarie counsel to apply to set aside the custody order.

The respondents aver that the actions of the applicants towards the child are not in accordance with the needs for guidance, love and affection of a child who is growing up in her teenage years. They say that the actions of the 1st applicant, in particular, towards the child have caused interruptions in the child's education because it has led to her switching from one school to another.

The respondents aver that the learned Syariah Judge had advised the parties to settle the matter amicably and to take the appropriate action if necessary and at no point in time did the learned Syariah Judge advise the parties to take proceedings in the civil court.

The Applicants' Reply

The applicants and their three other daughters share a close relationship with the child.

The contents of the police reports lodged by the 1st respondent and the child are false and were lodged in order to intimidate the applicants.

The report dated 29 October 2000 purportedly made by one Roshidah bt Ismail, a social welfare officer, is in actual fact only a letter which was fabricated and the applicants were never given the opportunity to express their views. Neither were they interviewed by her. It was not true that the applicants never asked for the child back before she attained the age of ten years old. In actual fact after the 1st applicant recovered fully from her post-partum depression she

and the 2nd applicant made repeated requests to the respondents for the return of the child but the respondents refused to do so even though the mother of the 1st respondent and the 1st applicant advised the 1st respondent to do so.

The respondents have neglected the studies of the child by giving her too much freedom, requiring her to assist them in their business activities, calling her constantly over the telephone when she was staying with the applicants, preventing her from returning to school on a Monday and sometimes two days following her fortnightly visit to the respondents' home, insisting that the child visit the respondents every weekend and taking the child to Kedah whilst the applicants were away at work.

The 1st applicant did not abuse the child by hitting the child on her head. She had hit the child on her hand in order to teach and guide the child because of the child's stubborn attitude which was brought about by the instigation of the respondents. This led to the respondents disallowing the child from seeing the applicants.

The Issues

The issues are as follows:

(i) Whether the court can order that the child be brought before this court for the hearing of the applicants' application;

(ii) Whether it is for the good of the child for this court to order the child to return to and stay with the applicants.

The Preliminary Objection

At the outset, Encik Ahmad Munawir, the learned counsel for the respondents, raised a preliminary objection. He contends that pursuant to art. 121(1A) of the Federal Constitution this court is barred from hearing this application on the ground that only the Syariah Court has the exclusive jurisdiction to hear this application since both the parties are Muslims and the subject matter of the application is the custody of a Muslim child.

In support thereof, he has relied on the following authorities *viz. Mohamad Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264 SC and *Lim Yik Ying v. Liang Yung Piao & Anor* [1999] 4 AMR 4668 CA.

In response, Mr. Darshan Singh Khaira, the learned counsel for the applicants, submits that this court has jurisdiction to hear this application for a writ of *habeas corpus* even though both the parties are Muslims.

He anchors his submissions on the following grounds:

First, he relies on the fact that as the respondents have not appealed against the custody order which was granted *inter partes* in favour of the applicants by the Syariah Court on 5 October 2000, that order stands unchallenged and should be given effect to.

In view of that he says that the contents of the respondents' affidavit-in-reply (encl. 5) and the applicants' affidavit-in-reply (encl. 6) are irrelevant as this court cannot go behind the custody order. He says further that it is trite law that as the parties are Muslims only the Syariah Court has jurisdiction to decide on questions of custody and this court is bound by that custody order and should give effect to it. He relies on the case of *Nor Kursiah bte Baharuddin v. Shahril b. Lamin & Anor* [1997] 1 CLJ Supp 599.

Secondly, he says that there is no provision in any of the State Administration of Islamic Religious Affairs Enactments providing for *habeas corpus*. There is also no provision in any other law giving jurisdiction and power to the Syariah Court to hear and decide *habeas corpus* applications. The jurisdiction of the High Court in *habeas corpus* matters is provided for in art. 5(2) of the FC and by Federal Law to wit, s. 365 of the CPC and para 1 of the Schedule in the Courts of Judicature Act 1964. Even if there is any State Law which gives jurisdiction to the Syariah Court in *habeas corpus* matters it would be *ultra vires* art. 75 of the FC and would, therefore, be invalid. Nowhere is it stated in art. 121(1A) of the FC that State Laws can give jurisdiction to the Syariah Court in *habeas corpus* matters. Jurisdiction to grant a writ of *habeas corpus* is given by Federal Law and not provided for in matters reserved for the Syariah Court under the State List.

He argues that the order of the Syariah Court refusing to hold the respondents in contempt for failing to hand over the child to the applicants is a nullity.

He submits, therefore, that it is appropriate to go by way of *habeas corpus* to enforce a custody order in respect of a child which has been obtained by consent.

In reply, Encik Ahmad Munawir submits that since s. 365(a) (ii) of the CPC has been invoked in this application, the court has to determine who has the better right to the custody of the child based on the child's welfare and since the Syariah Court has the sole jurisdiction over the welfare of the child in custody matters this court has no jurisdiction to issue the writ of *habeas corpus* sought for by the applicants.

He relies on the case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 707 FC in support of his contention that this court cannot review the decision of the Syariah Court made in the

committal proceedings and that the applicants should appeal to the Syariah High Court if they are not happy with the decision of the learned Syariah Subordinate Court judge in refusing to commit the respondents to prison for failing to hand over the child to the applicants.

Mr. Darshan Singh, on the other hand, urges the court to apply the case of *Lim Yik Ying v. Liang Yung Piao & Anor* [1999] 4 AMR 4668 where the facts are on all fours with the facts of the instant case and hold that *habeas corpus* is the correct remedy to ask for. In that case, the Court of Appeal had set aside the order of the learned High Court judge dismissing the application of the appellants for a writ of *habeas corpus* for the release to them of their natural daughter aged eight years since the learned High Court judge had given a previous order giving custody of the said child to the appellants.

In doing so the Court of Appeal held as follows and I reproduce below the head notes of the case under "Held":

1. It was not open to the respondents in the *habeas corpus* application to challenge the validity of the custody order dated July 21 1998 granting legal custody to the appellant. Although the respondents were not cited as parties to the originating summons, if they were serious in asserting their legal rights to the custody of the child, they should have taken steps to intervene in the originating summons and set aside the custody order made by the court, in accordance with s 10 of the Act. This they failed to do, and neither did they take steps to adopt the child if they honestly believed that the parents had abandoned the child. Instead the respondents seemed more interested in getting paid for taking care of and maintaining the child.

2. (a) Although the difficulties in resolving the facts could be appreciated the matter could have been resolved by resorting to Order 38 r. 2(3) of the rules of the High Court 1980. The burden of proving lawful justification was on the respondents. It was for the respondents to urge the court to invoke its discretionary power under Order 38 r. 2(3) and apply to the court for cross-examination of the appellant on her affidavits.

(b) The learned Judge had erred in the order he made. The learned Judge should have given due consideration to the custody order and its effect *vis-a-vis* the respondents. The issue of conflicting facts in the affidavits of both parties were of no importance in the face of the custody order. *Prima facie*, the appellant should be granted legal custody of the child.

The Law

The court shall now deal with the relevant law concerning *habeas corpus* and custody of Muslim children. Article 5 of the FC provides as follows:

(1) **No person shall be deprived of his** life or **personal liberty save in accordance with law**.

(2) **Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.** (emphasis added)

Article 74 of the FC provides as follows:

(1) Without prejudice to any power to make laws conferred on it by any other Article, **Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List** (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, **the Legislature of a State may make laws with respect to any of the matters enumerated in the State List** (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter. (emphasis added)

Article 121 of the FC provides as follows:

121. Judicial power of the Federation.

(1) **There shall be two High Courts of co-ordinate jurisdiction and status, namely:**

(a) **one in the States of Malaya, which shall be known as the High Court in Malaya** and shall have its principal registry in Kuala Lumpur; **and**

(b) **one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak** and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) **The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.** (emphasis added)

The CPC was passed by Parliament pursuant to art. 74 of the FC. Section 365 of the CPC provides as follows:

The High Court may whenever it thinks fit direct:

(a) **that any person who:**

(i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or

(ii) **is alleged to be illegally or improperly detained in** public or **private custody** within the limits of Malaysia.

be set at liberty;

(b) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law. (emphasis added)

In Penang, the Administration of Islamic Religious Affairs Enactment 1993 (hereinafter referred to as "the Enactment") contains provisions which provide comprehensively for the custody of Muslim children.

Section 48(2)(b)(iii) of the Enactment provides that a Syariah High Court shall in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to, *inter alia*, the guardianship or custody *(hadhanah)* of infants.

Section 50(1) of the Enactment provides that an appeal shall lie to the Syariah High Court against any decision of a Syariah subordinate court in its criminal jurisdiction or in its civil jurisdiction or in any other case if the Syariah High Court gives leave to appeal.

Part IV of the Enactment deals expressly with hadhanah or custody of children.

Section 81 provides as follows:

(1) Subject to section 82, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.

(2) **Where the Court is of the opinion that the mother is disqualified under 'Hukum Syara' from having the right to *hadhanah* or custody of her children the right shall subject to subsection (3), pass to one of the following order of preference, that is to say:**

(a) the maternal grandmother, how-high-soever;

(b) the father;

(c) the paternal grandmother, how-high-soever;

(d) the full sister;

(e) the uterine sister;

(f) the sanguine sister;

(g) the full sister's daughter;

(h) the uterine sister's daughter;

(i) the sanguine sister's daughter;

(j) the maternal aunt;

(k) the paternal aunt;

(l) the male relatives who could be their heirs as '*asabah* or residuaries.

Provided that the custody of that person does not affect the welfare of the child.

(3) No man shall have a right to the custody of a female child unless he is a muhrim, that is to say, he stands to her within the prohibited degrees of relationship.

(4) **Where there are several persons of the same line or degree, all equally qualified and willing to take charge of the child, the custody shall be entrusted to the one most virtuous who shows the greatest tenderness to the child, and where all are equally virtuous, then the senior among them in age shall have the priority.** (emphasis added)

Section 86(i) of the Enactment provides as follows:

(1) **Notwithstanding section 81, the court may at any time by order choose to place a child in the custody of any one of the persons mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons, the Court may by order place the child in the custody of any other person or of any association the objects of which include child welfare.**

(2) **In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to that consideration, the court shall have regard to:**

(a) the wishes of the parents of the child; and

(b) the wishes of the child, where he or she is of an age to express an independent opinion.

(3) **It shall be a reputable presumption that it is for the good of a child during his or her infancy to be with his or her mother, but in deciding whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.** (emphasis added)

Section 87 of the Enactment provides as follows:

(1) **An order for custody may be made subject to such conditions as the Court thinks fit to impose and, subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.**

(2) **Without prejudice to the generality of subsection (1), an order for custody may:**

(a) **contain conditions as to the place where the child is to live and as to the manner of his or her education;**

(b) **provide for the child to be temporarily in the care and control of some person other than the person given custody;**

(c) **provide for the child to visit a parent deprived of custody of any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the Court considers reasonable;**

(d) **give a parent deprived of custody of any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the Court considers reasonable;** or

(e) prohibit the person given custody from taking the child out of Malaysia. (emphasis added)

The court shall now deal with some of the decided cases cited by the learned counsels.

In the case of *Abdul Shaik bin Md. Ibrahim & Anor v. Hussein Ibrahim & 2 Ors* [1999] 3 CLJ 539 the plaintiffs who are Muslims and who are the natural parents of Noorhadiah binti Abdul Shaik ("the said child") had sought, *inter alia*, a declaration, from the Civil High Court that the adoption of the child by the 1st defendant who is the child's paternal uncle being the brother of the 1st plaintiff who is the natural father of the child, was null and void and an order that the 1st defendant and his wife, the 2nd defendant, return the child to the plaintiffs or in the alternative for an order that the plaintiffs be given access to the said child.

The paternal uncle sought to have the proceedings struck out pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC 1980") on the sole ground that the claims are within the jurisdiction of the Syariah Court and not the High Court.

The natural parents contended that their claims are within the jurisdiction of the High Court.

At the outset Abdul Hamid J (now a Court of Appeal judge) observed at p. 543 as follows:

> It is settled law that, in view of the provisions of Article 121(1A) of the Federal Constitution, if a matter falls within the jurisdiction of the Syariah Court, this court has no jurisdiction over it – see judgment of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & 1 Yg Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201, *Mohamad Habibullah bin Mahmood v. Faridah bt Dato' Talib* [1993] 1 CLJ 264 and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5.

In holding that the prayer for the return of the child involved, at least, the question of custody of a child which is a matter clearly within the jurisdiction of the Syariah Court as provided for in s. 81 to 87 of the Islamic Family Law (State of Penang) Enactment 1985 and that the plaintiffs should file a fresh action in the Syariah Court for the prayer for the return of the said child to the plaintiffs and the alternative prayer for access to the child by the plaintiffs, the learned judge held that following the judgment of the Federal Court in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia Kedah & Anor* [1999] 2 CLJ 5 which was written by Mohamed Dzaiddin FCJ, (now the Chief Justice) the correct approach which a court should adopt once a challenge to the jurisdiction of the Syariah Court (or for that matter of the civil High Court *vis-a-vis* the jurisdiction of the Syariah Court) is made is as follows and I quote the following excerpt:

the court should look at the State Enactments, not the State List to see whether the Syariah court has jurisdiction over the matter and if it has, then, this court has no jurisdiction over the matter.

In *Soon Singh*'s case although the remedy sought was for a declaration, the Federal Court had considered the question of jurisdiction purely on "the subject matter approach" as opposed to the "remedy approach" which was adopted in *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & 1 Yg. Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 by the Supreme Court where the subject matter of the suit was "wakaf" but the remedy sought was for an injunction.

In my judgment, the case of *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & 2 Ors* [1999] 3 CLJ 539 is applicable to the facts of the instant case and this court is bound by the judgments of the Federal court in *Soon Singh*'s case and *Sukma Darmawan*'s case. Therefore, the fact that the remedy sought for by the applicants in this case is a writ of *habeas corpus* which is not expressly conferred by the Enactment on the Syariah court does not mean that this court is seized with jurisdiction because custody of a Muslim child is a subject matter which is clearly within the jurisdiction of the Syariah Court by virtue of ss. 81 to 87 of the Enactment.

In the case of *Nor Kursiah Bte Baharuddin v. Shahril b. Lamin & Anor* [1997] 1 CLJ Supp 599, which was approved by the Court of Appeal in the case of *Lim Yik Ying v. Liang Yung Piao & Anor* [1999] 4 CLJ 589 CA the applicant who is the natural mother alleged that her child was illegally detained by his father and grandmother who are the 1st and 2nd respondents, respectively, despite a temporary order made by the Syariah High Court that the child was to be placed under the care and control of the 2nd respondent at the address of the 1st respondent. The applicant also contended that the temporary order of the Syariah Court had no effect because it was not served on the respondents before the child was taken away from her by the 1st respondent. The applicant further argued that in any "detention" if there is a failure to follow each step in the process, the court must interfere.

The respondents' counsel raised a preliminary objection that the High Court had no jurisdiction to hear the *habeas corpus* application.

KC Vohrah J (as His Lordship then was) dismissed the preliminary objection and held that the High Court has jurisdiction to entertain the *habeas corpus* application. In so holding His Lordship applied the judgment of the Supreme Court in the cases of *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & 1 Yg. Lain* [1992] 3 CLJ 675; [1992] 1 CLJ (Rep) 201 (which I have made reference to earlier on when commenting on the decision of the Federal court in *Soon Singh*'s case) and *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264.

Consequently, His Lordship held as follows on p. 604:

> It will be observed that this application carried with it its own seed of destruction from the day it was filed. The disclosure in the first supporting affidavit to the application that there is an order placing the child in the care and control of his grandmother and giving a direction that the child stays with his father – and the said order is an order that cannot be challenged in a civil court by virtue of Article 121(1A) of the Constitution, it having been issued by the Syariah Court within its jurisdiction and therefore a valid subsisting order – destroyed the very foundation of the allegation of the child being illegally detained by the respondents. The application fails *in limine* and I dismiss the application.

In the case of *NMY (an infant) v. Pengetua, Pusat Pemulihan Gadis, Taman Sri Puteri, Rembau, Negeri Sembilan Criminal Application* [1995] 3 CLJ 386 reported in para 1823 on p. 517 of *Mallal's Digest of Malaysian and Singapore Case Law*, 4th edn, 2001 Reissue, vol. 5, Hashim JC (now a Court of Appeal judge) in dismissing an application for a writ of *habeas corpus* by the maternal grandmother for the release of her granddaughter ("NMY"), a Muslim Juvenile aged 16 years and three months, who was at that time at a place of refuge for girls aged under 18 years of age who were ill-treated or exposed to moral danger held, *inter alia*, that under s. 366 of the CPC, the court, on an application for a writ of *habeas corpus* had to be satisfied that there were grounds for supposing that a detainee was being detained "against her will and without cause".

In my judgement, the facts in the *Nor Kursiah*'s case are distinguishable from the facts in the instant case because in that case the sole issue for the determination of the High Court is whether the child was illegally or improperly detained by the respondents.

The Decision Of This Court

It is apparent from the conflicting affidavits filed by the parties that quite apart from the dispute pertaining to whether the child was given to the respondents to be raised as their child or only merely handed over to the respondents to be taken care of temporarily until the 1st applicant recovered completely from her post partum depression, the bone of contention of the natural parents is that the child has not been brought up nor educated in a proper manner and their objective in filing the application is for this court to order that the child return to her natural parents on the ground that such an order is in the best interests of the child and is in accordance with the custody order despite the custody order having been obtained without the consent of the child, the two police reports lodged by the child, one stating that she prefers to stay with the respondents and the other alleging that the applicants dragged and punched her

on 26 October 2000 when they attempted to force her into a taxi to take her home with them and the refusal of the Syariah subordinate court to hold the respondents in contempt of the custody order and to commit the respondents to prison for non-compliance of the custody order.

The order of the Syariah subordinate court dismissing the applicants' application to commit the respondents to prison for non-compliance of the custody order is a valid and subsisting order which has overtaken the custody order. It cannot be challenged in a civil court by virtue of art. 121(1A) of the FC.

The effect of the second order is that the applicants' sole recourse now is to appeal to the Syariah High Court against the order of the Syariah subordinate court since the latter is satisfied that the child herself has refused to return to the applicants. This court cannot go into the merits of the order of the Syariah subordinate court because this court has no jurisdiction to review it. This court must accept it as a valid and subsisting order.

It is very pertinent that the application in the instant case for a writ of *habeas corpus* is not mounted on the ground that the child is illegally or improperly detained in the private custody of the respondents. The objective of the applicants in filing this application is to seek an order of the court that the child be produced for the purposes of the hearing of the application on its merits and upon the conclusion of the hearing of the application for this court to order the child to return to and be brought up by the applicants in the event that the applicants are successful in satisfying this court that such an order would be in the best interests of the child and because there is already a custody order.

In my judgement this court has no jurisdiction to grant the order sought because the writ of *habeas corpus* can only be granted to order that the child be set at liberty if this court is satisfied that the child is illegally or improperly detained. It is not intended to order that the child be produced so as to enable this court to determine whether it is for the good of the child who is a Muslim child that she returns to her natural parents and for this court to order accordingly. The reason is because whether it is for the good of or whether it is in the best interests of the child that she be returned to the applicants is for the Syariah Court to decide after taking into consideration all the facts and circumstances of the instant case and the relevant factors as provided for in ss. 81 to 87 of the Enactment.

The child here was aged 14 years at the time of the filing of the application and at the time when the court heard the application the child was already aged 14 years and six months unlike the child in the cases of *Nor Kursiah* and *Lim Yik Ying*. It is for the Syariah Court to determine whether she has already reached an age when she has a will and wishes of her own and is able to express an independent opinion. It is not disputed by the applicants that the custody order although obtained *inter partes* was obtained without the consent of the child.

More importantly, unlike the *Nor Kursiah* and *Lim Yik Ying* cases the applicants have failed in their committal proceedings against the respondents and there are allegations in the respondents' affidavit-in-reply and in the police reports lodged that the 1st applicant had hit the child on her head with a metal hanger and caused the child's head to be swollen and that the child has suffered bruises on her back as a result of a struggle which occurred when the applicants attempted to force her into a taxi to take her home with them.

Again it is for the Syariah Court to determine whether there is any truth in the allegations and counter allegations of the applicants, the respondents and the child.

In the premises the court allowed the preliminary objection of the respondents, declined to answer the second issue posed in the application and dismissed the application.